LIBRARY,
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1962
JOHN F. DAVIS, CLERK

No. 255

In the Supreme Court of the United States

OCTOBER TERM, 1962

FEDERAL TRADE COMMISSION, PETITIONER

v.

TIMKEN ROLLER BEARING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
J. WILLIAM DOOLITTLE,
Assistant to the Solicitor General,
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys,
Department of Justice, Washington 25, D.C.

JAMES McI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
ALVIN L. BERMAN,
THOMAS F. HOWDER,
Attorneys,
Federal Trade Commission,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 255

FEDERAL TRADE COMMISSION, PETITIONER

v.

TIMKEN ROLLER BEARING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

As we pointed out in the Petition (Pet. 18–21), the fundamental error of the court below lies in the fact that it made "its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73)—a function that has been reserved by Congress to the Commission. A perfect illustration of that defective process is reflected in Timken's effort to defend the decision below by carefully selecting, for somewhat more detailed treatment in its Brief in Opposition (Br. Opp. 22–26), two of the episodes on which the Commission's charge was based.[1] By picking only so much of the evidence

[1] These two episodes were discussed at p. 9 of the Petition.

and by drawing only such of the possible inferences as support its own conclusions, Timken has managed to portray these episodes in a largely innocent light—just as the court below did as to Timken's whole course of conduct by employing the same invalid technique. However, a fair and objective examination of the full record relating to this very pair of episodes discloses that there is *other* evidence not discussed by Timken, and that there are *other* inferences reasonably to be drawn. In the following paragraphs, we discuss some of the additional evidence and alternative inferences—not for the purpose of debating the merits of the question whether Timken's conduct violated the antitrust laws, but to demonstrate through these examples (chosen by Timken) that it was only by improperly substituting its own judgment on the weight of the evidence and on the inferences to be drawn therefrom that the court below was able to conclude that the Commission's order "is not supported by substantial evidence in the record considered as a whole" (Pet. App. A, p. 6a).

1. The Commission's evidence established that Timken's San Francisco Branch Manager called on Green Motor Parts (a Bower distributor), which had just purchased Corcoran Auto Supply (a Timken jobber), and made the following written report to Timken (Tim. App. 310a–311a):

> When I contacted them soon after the announcement was made that they were purchasing the Corcoran Auto Supply, they indicated they would be willing to retain Timken in the

> Corcoran branch, but did not want to relinquish the Bower franchise in the five other outlets. Since that time we have made as thorough an investigation as possible of the possible replacements in Corcoran, and our consensus was that Green Motor Parts offered the greatest possibilities. Accordingly we arranged for an interview with Mr. Green and Mr. Hermanson and they have told us they would be very pleased to drop the Bower line in all of their outlets and go 100% Timken.

This documentary evidence provided a reasonable basis for the inference that (1) when Timken learned that Green did not wish to sell Timken exclusively in all of its stores, Timken began to look for "possible replacements" for the one store in which Green *did* wish to retain the Timken franchise; and (2), when Green learned of this, in order to retain the Timken franchise in that one store, Green reluctantly consented to "drop the Bower line in all of their outlets and go 100% Timken." Considered in the light of the other evidence as to Timken's policies and practices (see Pet. 5–14), it lent substantial support to a conclusion that Timken enforced a policy of refusing to grant dealerships unless the dealer would handle Timken exclusively.

Timken points out (Br. Opp. 23) that this dealer, in the hearings held some five years later,[2] explained that his reason for switching from Bower to Timken had been that two trial orders he placed with Timken

[2] The dealer had some difficulty in recalling all of the circumstances, because they happened "quite awhile ago" (Tim. App. 319a).

were completely filled, whereas his shipments from Bower had always been incomplete (Tim. App. 314a, 321a–322a). However, in evaluating this latter-day gloss upon the Branch Manager's report, the Commission was entitled to take into account these facts: (1) This dealer was a Timken distributor as of the time of the hearings (see Tim. App. 318a). (2) Although he had been a Bower distributor for five years prior to his switch to Timken (Tim. App. 312a) and Bower had during that entire period failed to fill his orders satisfactorily (Tim. App. 323a), this dealer had never before sought to obtain a Timken distributorship (Tim. App. 318a), and, as recently as the beginning of the discussions described in the Branch Manager's report, he "did not want to relinquish the Bower franchise" in his old stores (Tim. App. 311a). (3) Even if the dealer had suddenly changed his mind and decided he wanted to take on a Timken franchise covering all of his stores, this, of course, does not establish on what conditions or with what understanding *Timken* was willing to enter into such an arrangement.

The dealer testified that the decision to carry Timken bearings exclusively was not "based in any way upon any threat * * * that [he] had to go Timken 100 percent in all [his] stores to get the Timken line at all" (Tim. App. 314a–315a); the Branch Manager also testified that the dealer's prompt disposal of his Bower line had not been imposed on the dealer as a "condition in connection with granting him a distributor agreement" and that there was no "agreement" to that effect (Tim. App. 329a–330a). However, the dealer testified to an "understanding" be-

tween him and the Branch Manager: it was "completely understood" that, if he "switched over" from Bower to Timken, he would "dispose of Bower as fast as [he] could and fill in with Timken" (Tim. App. 319a–320a). It is also noteworthy that (according to the testimony of both the dealer and the Branch Manager), when the dealer later wished to make an exchange of bearings with Bower (see Br. Opp. 24), the dealer had to discuss the matter with Timken's Branch Manager (Tim. App., 316a–317a), who told him that the proposed exchange would be "acceptable" to Timken (Tim. App. 329a).[4] Thus, even apart from the incriminating and inadequately explained documentary evidence of record, this testimony provided the Commission with ample support for a conclusion that Timken had extracted an exclusive-dealing "understanding" from this dealer and that it had policed the dealer's compliance with that agreement.

2. The Commission's evidence further established that Timken's Los Angeles Branch Manager, in a letter informing a distributor of the planned appoint-

[3] Of course, Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. 14), under which Timken was charged, prohibits not only any "condition" or "agreement" for exclusive dealing but any "understanding" as well.

[4] Timken points out (Br. Opp. 24) that the dealer has continued to purchase Bower bearings regularly; however, what Timken fails to point out is that the dealer testified unequivocally that these were solely "emergency" purchases (Tim. App. 324a, 326a). See Petition herein, pp. 13–14, 16, 23, n. 30. In this connection, it is relevant to note that, notwithstanding whatever outside purchasing he did, the dealer in question plainly regarded himself as being a "100 percent Timken" dealer (see Tim. App. 314a–315a).

ment of a new jobber in the distributor's territory, stated (Tim. App. 379a):

> We reserve the right to review this account within a reasonable length of time to determine if they have disposed of their assorted stock of tapered roller bearings. We believe that any concern who advertises themselves as an authorized jobber for Timken roller bearings should be one in fact.

From this documentary evidence the inference could reasonably be drawn that Timken had consented to the appointment of this jobber only upon the condition or understanding that he dispose of any competitive bearings "within a reasonable time" and that Timken intended to police compliance with that arrangement. Like the previous example, this evidence provided valid support (taken together with many such examples) for a conclus on that Timken enforced a policy of exclusive dealing against its present and potential jobbers and distributors.

Timken urges (Br. Opp. 25–26) that at the hearings the Branch Manager testified that this jobber's stock had included surplus, or secondhand bearings and that there are legitimate business reasons for Timken's not wanting its dealers to carry such bearings. However, there is nothing upon the face of the letter to suggest that it was concerned only with surplus bearings; it appears to contemplate the disposition of all competitive bearings, so that the dealer could be an authorized Timken jobber "in fact." Moreover, the Branch Manager's testimony made it quite clear that the "assorted stock" referred to in the letter was not

in fact limited to surplus bearings: in describing this particular jobber's stock, he said, "They had an assorted stock of tapered bearings of several different makes, including some Timken" (Tim. App. 380a), and it was only when Timken's counsel asked him whether the stock included any surplus bearings that he added, "Yes, surplus bearings, and those of other manufacturers, such as ABC" (*ibid.*). Furthermore, in explaining Timken's concern as to the character of a jobber's stock, he testified (Tim. App. 381a):

> "We are also interested in the sales angle. We want their business, and we can't get their business if they handle these other miscellaneous makes of bearings.

Thus, the Commission's documentary evidence was, if anything, bolstered by the witness's testimony in supporting a conclusion that, as a condition to the appointment and continuance of a dealer as an authorized jobber, Timken required—and oversaw—the prompt disposal of competitive bearings.

The contrast between the foregoing analysis of these two episodes and that presented by Timken in its Brief in Opposition amply demonstrates, at the very least, that evidence can be found and inferences drawn to support each of two diametrically opposed conclusions concerning Timken's course of conduct: the Commission's, that it amounted to exclusive dealing; and the court's, that it did not. The question is thus posed: whose function is it to evaluate the evidence and draw the inferences, the court or the administrative agency? The answer, long settled by this Court, is that Congress assigned to the Commis-

sion the duty of determining the facts and, to that end, of appraising the evidentiary record. By taking over that function itself, the court below committed an error of such magnitude that, in view of the economic importance of this case (Pet. 17–18, 21–23), review by this Court is clearly called for.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

J. WILLIAM DOOLITTLE,
Assistant to the Solicitor General.

ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JAMES McI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

ALVIN L. BERMAN,
THOMAS F. HOWDER,
Attorneys,
Federal Trade Commission.

SEPTEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962